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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, A. D., 1942

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**No.** .....

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JACK MARKS,  
*Petitioner*

vs.

JOHN H. HOFFMAN, RECEIVER OF THE WEST  
VIRGINIA BANK, an insolvent state  
banking corporation,  
*Respondent.*

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PETITION OF JACK MARKS FOR WRIT OF  
CERTIORARI TO THE CIRCUIT COURT OF  
HARRISON COUNTY, WEST VIRGINIA

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*To the Honorable the Chief Justice and Associate  
Justices of the Supreme Court of the United States:*

Your petitioner, Jack Marks, submits this petition for a writ of certiorari to review a decision of the Circuit Court of Harrison County, West Virginia, and files herewith a certified copy of the entire transcript of record in said action and his brief in support of this petition.

The opinion of the Circuit Judge of Harrison County, West Virginia, is found herein and, in the record, pages 343-353.

An application for a writ of error by the Supreme Court of Appeals of West Virginia was refused on the 11th day of May, 1942 a second application for said writ of error was refused on the 15th day of June 1942. (R. P. 395) and a third application on the 31st day of July, 1942 by an order holding the decision of the Circuit Court of Harrison County to be plainly right (R. P. 394).

## I.

### **SUMMARY OF THE MATTER INVOLVED**

This suit was brought by E. A. Rinehart, Receiver of the West Virginia Bank to enforce against this petitioner his purported double liability under the West Virginia Constitution Art. 11, Sec. 6, West Virginia Code, 31-8-32, as a stockholder in said bank. Judgment was entered upon a directed verdict in favor of the plaintiff for Nine Thousand Six Hundred and Thirty-six (\$9,636.00) Dollars with interest from February 13, 1942.

The West Virginia Bank, a state banking corporation, with capital stock of \$200,000.00 doing business at Clarksburg, West Virginia, closed its doors and ceased to do business as a banking institution on Saturday, December 30, 1933. Just prior to that date the West Virginia Bank negotiated with The Merchants National Bank of Clarksburg (hereinafter called the Merchants National Bank) and the Reconstruction Finance Corporation (hereinafter called RFC) for a solution to its financial problems. These negotiations resulted in a loan by the RFC to the West Virginia Bank of \$605,000.00. Of this amount \$129,150.02 was retained by the RFC to extinguish and pay off a

prior loan made to the West Virginia Bank by the RFC; \$27,175.00 was paid to the Mellon National Bank of Pittsburgh for prior indebtedness of the West Virginia Bank; \$16,000.00 was paid to the Merchants National Bank for prior indebtedness of the West Virginia Bank; and \$432,674.48 was paid to the Merchants National Bank as a credit on a note of the West Virginin Bank given by that bank to the Merchants National Bank, dated the 30th day of December, 1933 and in the amount of \$748,000.00, the amount of the entire deposit liability of the West Virginia Bank. The Merchants National Bank by contract dated the 30th day of December, 1933 agreed to assume, pay off and discharge the entire deposit liability of the West Virginia Bank and in return was to receive and did receive \$290,836.40 in cash, clearings, notes and drafts from the West Virginia Bank and \$432,674.48 from the RFC. The RFC was to receive and did receive all the remaining assets (R. P. 237) of the West Virginia Bank including stocks, bonds, notes, real estate and other assets having a face value of more than \$800,000.00 (R. P. 240-241) and excepting therefrom only certain fixtures such as tables, typewriters and adding machines having a nominal value at most.

After the consumation of these transactions which occurred without the knowledge consent or approval of the stockholders of the West Virginia Bank (R. P. 123,128) but with the consent and approval of the State Banking Commissioner, the State Banking Commissioner on January 9th, 1934, appointed E. A. Rinehart, Receiver of the West Virginia Bank and simultaneously therewith levied an assessment of 100% against the stockholders of said Bank. Five months later, on June 1st, 1934, still without any action ever having been taken by the stockholders of said Bank, the Receiver with Walter Elliott and Ira

Swiger made an intentry of said Bank's condition which said inventory should have been made by the State Banking Commissioner (Code 31-8-32) prior to the levy of any assessment against stockholders. The defendant objected to the entering of the "Exhibit Assessment of Double Liability" (R. P. 220) on the ground that Chapter 31, Article 8, Section 32, had not been complied with by the Receiver, nevertheless his objection was overruled and the exhibit entered and read to the jury.

This suit was begun by a notice of motion for judgment proceeding filed in the office of the Clerk of the Circuit Court of Harrison County on December 17, 1936. The record discloses that a counter affidavit and plea in abatement were filed on the return day of said notice of motion for judgment January 4, 1937 (R. P. 9) January 9, 1937, plaintiff demurred to said plea in abatement which demurrer was disposed of October 6, 1937 (R. P. 17), and this petitioner was given until December 1, 1937 to file special pleas, which were filed on that day (R. P. 18). On May 5, 1938, plaintiff interposed demurrers to said pleas, which demurrers were sustained on July 12, 1941 (R. P. 78) and this action the Circuit Court on its own motion certified to the Supreme Court of Appeals of West Virginia which court refused to docket said case on November 10, 1941 (R. P. 86). At the January, 1942 term of the Circuit Court of Harrison County this case was set down for trial and was tried before a jury on the 12th and 13th days of February, 1942 at which time the court sustained plaintiff's motion for a directed verdict (R. P. 352). This petitioner then moved the court to set aside said directed verdict and assigned grounds therefore (R. P. 353, 354, 355) which motion was promptly overruled, to which action of the court in refusing to set aside said verdict, the defendant duly excepted (R. P. 355). Your



petitioner then made application for a writ of error to the Supreme Court of Appeals of West Virginia which application was thrice refused, the third time on the 31st day of July, 1942, by an order holding the lower court ruling to be plainly right.

## II.

### **STATEMENT OF BASIS UPON WHICH IT IS CONTENDED THAT THIS COURT HAS JURIS- DICTION TO REVIEW THE JUDGMENT IN QUESTION.**

This Court's jurisdiction to issue the writ of certiorari herein prayed for is established by Section 237 of the Judicial Code, as amended (U. S. C. A. Title 28, Sec. 344), paragraph (b), which reads as follows:

"It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had \* \* \*."

After providing for review in certain cases by writ of certiorari, Sub. Sec. (b) of the same Statute further in part provides:

"\* \* \* where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or *statute* of, or commission held or authority exer-

cised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. \* \* \*

The Supreme Court of Appeals of West Virginia having refused an application for a writ of error to the judgment of the Circuit Court of Harrison County, this Court should review the judgment of said Circuit Court on writ of certiorari.

Under the Code of West Virginia, Chapter 58, Art. 5, Sec. 1, it is said:

"A party to a controversy in any Circuit Court may obtain from the Supreme Court of Appeals or a Judge thereof in vacation, an appeal from or a writ of error or supersedeas to, a judgment, decree or order of such Circuit Court in the following cases:

(a) In civil cases where the matter in controversy, exclusive of costs, is of greater value or amount than one hundred dollars, wherein there is a final judgment, decree or order; \* \* \*."

After providing for a writ of error under the Code of West Virginia, Chapter 58, Art. 5, Sec. 4, says:

"No petition shall be presented for an appeal from, or writ of error or supersedeas to, any judgment, decree, or order, whether the State be a party thereto or not, which shall have been rendered or made more than eight months before such petition is presented."

The Code of West Virginia, Chapter 58, Art. 5, Sec. 9, states:

"In a case wherein the Court shall deem the judgment, decree, or order complained of plainly right, and reject it on that ground, no other petition therein shall afterwards be entertained.  
\* \* \*"

Sec. 8 of the Act of February 13, 1925 U. S. C. A. Title 28, Sec. 350) provides in part as follows:

"No appeal or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, \* \* \*."

The judgment of the Circuit Court of Harrison County, was entered on the 13th day of February, 1942 (R. P. 142-144) and became final upon the 31st day of July, 1942, the date of the last refusal of a writ of error by the Supreme Court of Appeals of West Virginia sitting en banc (R. P. 394) and this petition is filed within three months thereafter.

### III.

#### THE QUESTIONS PRESENTED

The questions presented for decision in the case may be stated as follows:

1. Did the bank stockholders double liability imposed by the State Constitution Article 11, Section 6; W. Va.

Code Chapter 31, Article 4, Section 16, pass to the RFC as an asset securing the government loan of \$605,000.00 made to the West Virginia Bank on December 18 1933?

2. Was the construction placed on the RFC Act, a Federal Statute, by the Circuit Court of Appeals of the 7th Circuit, binding on the Circuit Court of Harrison County, West Virginia in this action?

3. Was the failure by the Commissioner of Banking to comply with statutory provisions imposed by Code Chapter 31, Article 8, Section 32, relative to the making of an inventory of assets and an itemization of liabilities, a condition precedent, that must be satisfied before any form of remedy be restored to?

4. Were the assets of the West Virginia Bank, an insolvent state banking institution, being liquidated by the RFC and the Merchants National Bank at the time of the institution of this suit by the receiver against this petitioner?

5. Did the Merchants National Bank by implication become liable for the debts of the West Virginia Bank under the contract made and entered into between the two banks dated December 30, 1933 in evidence in this action?

6. Did the Merchants National Bank become primarily liable to the Creditors of the West Virginia Bank by reason of the com-mingling of the assets of said banking institutions.

7. Were there any creditors of the West Virginia Bank at the time it closed its doors or at the date of the institution of this suit as contemplated by the framers of the Constitution of West Virginia Article 11, Section 6?

## IV.

**REASONS RELIED UPON FOR THE  
ALLOWANCE OF THE WRIT**

The reasons relied upon for the allowance of the writ herein are:

1. That the Circuit Court of Harrison County, West Virginia, in construing the Reconstruction Finance Corporation Act, has decided an important question of Federal law in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit,

2. That there was raised in the Circuit Court a Federal question as to whether or not the stockholders' double liability attached and passed as security for the Government loan of \$605,000.00 to the West Virginia Bank under the RFC Act (R. P. 268) which was decided by said Court adversely to petitioners right and in conflict with Federal decisions, when said Circuit Court overruled defendant's motion to direct a verdict.

3. And in overruling defendant's motion to set aside the directed verdict a like Federal question was raised and decided by the Circuit Court (R. P. 353 to 355).

4. That the Court in holding that the Commissioner of Banking for the State of West Virginia, had complied with the conditions precedent, imposed by Chapter 31, Article 8, Section 32 of the Code of West Virginia, as to inventory and itemization of liabilities before instituting suit, decided an important question in conflict with applicable decision of this Court.

5. That the Circuit Court erred in holding that the assets of the West Virginia Bank were not being liquidated by the RFC and the Merchants National Bank.

6. That the Circuit Court erred in interpreting the

decisions of the Supreme Court of Appeals of West Virginia in the cases of *Lawhead v. Adams*, 113 W. Va. 604, 169 S. E. 330, and *Lawhead v. Edwards*, 114 W. Va. 597, 172 S. E. 985, when it decided as a question of law that neither the Merchants National Bank or the RFC were liquidating the assets of the West Virginia Bank.

A certified copy of the record in the above styled action accompanies this petition.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the Circuit Court of Harrison County, West Virginia, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Harrison County in said action entitled "*John H. Hoffman, Receiver, v. Jack Marks*", to the end that said action may be reviewed and determined by this Court as provided by Section 237 of the Judicial Code as amended, and that your Petitioner may have such other and further relief and remedy in the premises as the Court may deem appropriate and in conformity with the provisions of law, and that the said judgment of the said Circuit Court of Harrison County in said case and every part thereof may be reversed and dismissed by this Honorable Court.

JACK MARKS

By,

CHARLES C. SCOTT,

CLARENCE ROGERS,

*His Counsel.*

CHARLES C. SCOTT,

RAY L. STROTHER,

CLARENCE ROGERS,

*Counsel for Petitioner.*

